IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-719

* * *

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners

V.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON A DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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SUBJECT INDEX

INDEX OF AUTHORITIES

CASES PAGES

OTHER AUTHORITIES:

STATUTES: PAGES

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The respondents, the Houston Welfare Rights Organization, Agnes Stafford, Dorothy Phoenix, Paula Ortega and Maria San Juana Ortega, appellants below, oppose the granting of a writ of certiorari to review a decision of the Fifth Circuit Court of Appeals of July 13, 1977.

QUESTIONS PRESENTED FOR REVIEW

Respondents would add the following questions in opposition to the writ for certiorari because they are dissatisfied with the statement of petitioner under Rule 40(3) of the Supreme Court Rules. Respondents begin with number four. Petitioners state the first three.

(4) Does 28 U.S.C. §1343(3) give federal district courts jurisdiction over a state-federal welfare conflict raising whether 42 U.S.C. §1983 or §602(a)(23) is an equal rights statute and whether 42 U.S.C. §1983 secures review of conflicts under the Supremacy Clause?

(5) Does the record clearly raise the jurisdictional issue or is it obscure because of respondents two attempts to amend their petition in district court pursuant to 28 U.S.C. §1653 to obtain pendent jurisdiction?

CONSTITUTIONAL AND OTHER PROVISIONS

Because respondents are dissatisfied with the statement of the statutes involved they quote three others pursuant to Rule 40(3) of the Supreme Court Rules.

The Jurisdictional provisions at 28 U.S.C. §1343(3&4)(added)

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens.... (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

The right to amend at 28 U.S.C. §1653

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

STATEMENT OF THE CASE

On March 7, 1973, respondents, a welfare rights organization and individual recipient families, brought a welfare suit in federal district court to restrain a reduction in grants to smaller families (R.1-19). They lost the temporary motion and again lost on summary judgment, but prevailed on appeal only as to the proration point. In the heat of litigation they mistakingly, failed to allege pendent jurisdiction pursuant to Hagans v. Levine,415 U.S. 528(1974). When the district pointed their error out, the welfare recipients moved earnestly to amend. So earnestly that they will detail their attempts.

The recipients tried to amend their complaint to obtain pendent jurisdiction

under the method approved by Hagans v. Levine, 415 U.S. 528 (1974). They were so earnest in this effort that they will detail their attempts.

The district court first indicated jurisdictional problems in its memorandum and opinion dated February 11, 1975 (R. 288-305). Prior to signature of the judgment, respondents filed a motion to reopen the court's memorandum for leave to amend petition (R. 308-309). After signature of judgment, respondents again filed another motion to modify judgment for leave to amend petition (R. 317-318). The court denied both motions on May 9, 1975 (R. 319). The recipients marized this history in their notice of appeal to the Fifth Circuit (R. 320). The court cited the demands on its docket as the reason for denial of the motion. The court also erroneously spoke of the fact that respondents had their day in court. To the

contrary the court decided the case on the papers of cross motions for summary judgment. There was no trial and respondents had no opportunity to amend by oral motion.

Also the welfare recipients alleged an additional jurisdictional ground not rejected below 28 U.S.C. §1343(3)(first amended complaint, para. 3, p. 2 (R. 178-194)).

Perhaps a few words are appropriate on the merits. The welfare recipients brought this AFDC case as a challenge to the present flat grant established by consolidating the former itemized standard of need. Previously the petitioner budgetted four items of need. Now he budgets one figure from a schedule arrived at by averaging the former items.

The welfare recipients stated the issues around the level of the flat grant. They prevailed below on the levels added in for

shelter and utilities. The court of appeals held that these levels could not be prorated downward when the recipient lived with other persons. Petitioner asks for a writ of certiorari because of the required increase in the standard of need for some recipients.

ARGUMENT AGAINST GRANTING THE WRIT

Respondents address these arguments in the order of questions presented for review. Therefore they begin their argument with petitioner's first point on district court jurisdiction.

(1). Jurisdiction exists under 28 U.S.C. §1343(4)

Respondents recognize that the circuits conflict on 28 U.S.C. §1343(4) jurisdiction, but rely on the face of the jurisdictional provision and point out one limit in the breadth of petitioner's question. 28 U.S.C. §1343(4) gives federal district courts jurisdiction over "any civil action...to recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights." Since 42 U.S.C. §1983 is a statute protecting civil rights, jurisdiction lies. The leading Fifth Circuit case of Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969), supported the Fourth Circuit on the same position in Blue v. Craig, 505 F.2d. 830 (4th Cir. 1974). Furthermore other courts have recognized the wide scope of §1343(4) (Jones v. Mayer, 392 U.S. 409,412 n.1(1968);

Crowe v. Eastern Board of Cherokee Indians, 506 F.2d 1231, 1234(1974 Cir. 4) and Common Cause v. Democratic National Comm., 333 F. Supp. 803, 808 n.8(D.D.C. 1971)).

Petitioner indicates in his petition at p. 6 that the Fifth Circuit found no supremacy clause claim. The Fifth Circuit footnote merely does not use that label (A.B-30 n.1). Respondents argue that a federal-state conflict under the Social Security Act states a supremacy clause claim.

(2). There is no conflict with prior decisions of this court on the merits.

The Fifth Circuit held that the petitioner's proration policy presumed that a person living with the AFDC family contributes income to the family and thus violated 45 C.F.R. §233.90(a)(1976) and this court's decision in Van Lare v. Hurley, 421 U.S. 338 (1975). They would specifically point out that Van Lare was not available to the district court. The Fifth Circuit was the first court to apply it to the Texas policy.

Simultaneously petitioner hints at a

conflict between a prior decision of this court Jefferson v. Hackney, 406 U.S. 535 (1972), with the decision below. Jefferson involved an entirely different method of establishing need which took effect in 1969. The instant case deals with a standard of need effective four years later in 1973. The circuit court likewise considered this question and rejected it.

(3). There is no intrusion into state discretion to set the standard of need.

Congress limited state discretion to set its standard of need by 42 U.S.C. §602 (a)(23). This court has recognized this limitation in Dandridge v. Williams, 397 U.S. 471, 482(1970), and in Rosado v. Wyman, 397 U.S. 397(1970). Petitioner may not deprive welfare recipients of their 1969 cost of living increase.

(A4). Respondent's additional reasons for opposing the writ

Respondents urge two reasons not relied on by the court below for denying this writ of certiorari: an alternate ground for jurisdiction 42 U.S.C. §1343(3) and the fact that the district court denied respondent's motions to amend the petition to state a constitutional issue beyond the Supremacy Clause Claims. Respondents raise these supporting grounds as matters overlooked by the Court of Appeals (Dandridge v. Williams, 397 U.S. 471, 475 at n.6(1970); Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468(1947); Bondholder's Com'e v. Com'r of Internal Revenue, 315 U.S. 189, 192 at n.2(1942); Langnes v. Green, 282 U.S. 531, 538-539(1931); United States v. Am. Ry. Express Co., 265 U.S. 425, 435-436 (1924)).

(4). Alternate jurisdiction under 42 U.S.C. §1343(3)

The court should not grant this petition for a writ of certiorari because there are additional grounds for alleged jurisdiction than those relied on by the district court. Respondent alleged jurisdiction on both 42 U.S.C. §1343(3) as well as 42 U.S.C. §1343(4). The district court merely found jurisdiction on the latter ground.

Plaintiffs argue that the Civil Rights Act, 42 U.S.C. §1983, provides a cause of action for when the right denied is a right secured by a federal statute. They urge two reasons in support. First, §1983 is an equal rights statute for the purposes of 28 U.S.C. §1343(3). And second, §1983 secures review of conflicts between federal and state law under the Supremacy Clause. In other words these conflicts are constitutional claims for the purposes of 28 U.S.C. §1343(3). (See Examining Board v. Otero, 426 U.S. 572(1976)).

The petitioner cites an abstract of a decision of the Third Circuit finding no jurisdiction under §1343(3)(Gonzales v. Young, _____F.2d._____, 46 L.W. 2065 (July 15, 1977, Cir. 3)). The court needs the full text because as early as 1947, the third circuit found jurisdiction in similar cases (Bomar v. Keyes, 162 F. 2d 136 (3rd Cir. 1947), cert. den. 332 U.S. 825(1947)). Later the Fourth and Fifth Circuits joined the third (Blue v. Craig, 505 F. 2d 830 (4th Cir. 1974); Gomez v. Florida State Et. Services, 417 F.2d 569 (5th Cir. 1969)).

As to the equal rights point, the court should also note that respondents plead a class action on a 42 U.S.C. §602(a)(23) claim with language of "unreasonable relation(ships)" and "unfair" discrimination (R. 178-194, First Amended Complaint para. 2d, p.2; para. 53, p.11; para. 59, p.11). This highest court has previously interpreted 42 U.S.C. §602(a)(23) to have the purpose of

"prod(ding) the States to apportion their payments on a more equitable basis" (Rosado v. Wyman, 397 U.S. 397, 413 (1970)). 42 U.S.C. §602(a)(23) addressed the unfairness of dollar maximums on welfare grants litigated as an equal protection case in Dandridge v. Williams, 397 U.S. 471,482(1970). Respondents plead an equal rights statute in their class action.

(5) . Obscurity of record given attempt to amend

The court should not grant this petition for a writ of certiorari because the record does not clearly raise the jurisdictional issue. Both after the trial court's opinion and again after entry of judgment, respondents moved for leave to amend their petition to state a constitutional issue beyond the Supremacy Clause claims . In those motions, they reminded the court that they briefed a due process issue in their motion for summary judgment. The district court denied their motion to amend the petition presumably because it found jurisdiction on alternate grounds now under challenge.

Respondents' motion was after notice and before judgment. It was timely and was entitled to consideration (McGovern v. American Airlines, Inc. 511 F.2d 653, 654(1975 Cir. 5); John Birch Society v. Nat'l Broadcasting Co., 377 F.2d 194, 199(1967 Cir. 2)). Under 28 U.S.C. §1653, respondents would be entitled

to amend (Schlesinger v. Councilman, 420 U.S. 738, 744 n.9(1975); Forman v. Davis, 371 U.S. 178(1962); Jones v. Freeman, 400 F. 2d 383-387(1968 Cir. 8); Dolche v. Board of Levee, 46 F. 2d 340, 342(E.D. La. 1930)). But it was unnecessary for the district court to reach that issue because it found jurisdiction on alternate grounds (United States v. Am. Ry. Express Co., 265 U.S. 531, 538-539 (1931)). Respondents sought rather neither to enlarge their own rights, nor lessen those of their adversary.

CONCLUSION

Respondents pray that the court deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey J. Skarda, attorney for respondents, hereby certify that three copies of the above document was delivered to counsel for petitioners, John L. Hill, David M. Kendall, Steve Bickerstaff, and David H. Young, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, on the 11th day of December, 1977, by mail.

Jeffrey J. Skarda